

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	
	)	CSR 7396-E
Petition for Determination of Effective	)	
Competition in Various South Carolina	)	
Communities	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 14, 2008**

**Released: August 15, 2008**

By the Associate Chief, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Cable Inc., hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as “Communities.”<sup>1</sup> Petitioner alleges that its cable systems serving the communities listed on Attachment B and hereinafter referred to as Group B Communities, as well as the communities listed in Attachment C and hereinafter referred to as Group C Communities, are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)<sup>2</sup> and the Commission’s implementing rules,<sup>3</sup> and are therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). This portion of the Petition is unopposed. Petitioner additionally claims to be exempt from cable rate regulation in the City of North Charleston because Petitioner serves fewer than 30 percent of the households in the franchise area. The City of North Charleston opposed this portion of the petition<sup>4</sup> and Petitioner replied.<sup>5</sup>

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>6</sup> as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>7</sup> The cable operator bears the burden of rebutting the

<sup>1</sup> Time Warner Cable Inc., Petition for Special Relief (dated June 29, 2007) (“Petition”).

<sup>2</sup> See 47 U.S.C. § 543(a)(1).

<sup>3</sup> 47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

<sup>4</sup> Objection by the City of North Charleston to Time Warner Cable, Inc.’s Petition for Special Relief (dated Aug. 11, 2007) (“Objection”). On September 12, 2007, the City of North Charleston also filed a “Response to Time Warner Cable, Inc.’s Reply” (“Response”). While the Commission’s rules generally do not permit such a filing, we consider this pleading herein in order to ensure that we review the full record.

<sup>5</sup> Time Warner Cable Inc., Reply (dated Aug. 24, 2007) (“Reply”).

<sup>6</sup> 47 C.F.R. § 76.906.

<sup>7</sup> See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>8</sup> For the reasons set forth below, we grant the petition as to all of the Group B Communities and the City of North Charleston based on our finding that Petitioner is subject to effective competition in them, and we deny the petition as to the Group C Communities.

## II. DISCUSSION

### A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;<sup>9</sup> this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>10</sup>

5. Turning to the first prong of this test, it is undisputed that the Group B Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability. The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>11</sup> Petitioner has demonstrated that this is the case for both the Group B and Group C Communities.<sup>12</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.<sup>13</sup> Time Warner indicates that the program offerings are available on the websites of both DIRECTV and Dish, and we have reviewed their websites and confirmed that their program offerings meet the test.<sup>14</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Group B and Group C Communities because of their national satellite footprint.<sup>15</sup> Accordingly, we find that the first prong of the competing provider test is satisfied as to both the Group B and Group C Communities.

6. The second prong of the competing provider test requires that the number of households

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<sup>8</sup>See 47 C.F.R. §§ 76.906 & 907.

<sup>9</sup>47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>10</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>11</sup>*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>12</sup>Petition at 4-5, 7-9.

<sup>13</sup>See 47 C.F.R. § 76.905(g). See also Petition at 5-6.

<sup>14</sup>See Petition at 6.

<sup>15</sup>See Petition at 6-7.

subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in each of the Group B and Group C Communities.<sup>16</sup> Petitioner sought to determine the competing provider penetration in these Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within these Communities on a five-digit zip code basis.<sup>17</sup>

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>18</sup> as reflected in Attachment B and Attachment C, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in both the Group B and Group C Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Group B and Group C Communities.

8. Attachment C, however, lists two communities, Ridgeville and Summerville, in which Petitioner’s data show that the combined subscribership of the DBS Providers and Petitioner exceed 100 percent of the households. In Ridgeville, Petitioner’s data shows its own subscribership alone exceeding 100 percent of the households. This data is obviously inaccurate and unreliable. It may be that the excessive subscribership totals result from the combined application of very small populations (in Ridgeville, for instance, there are only a few hundred households) and five-digit zip codes that cover large areas and many households outside the franchise area. Nevertheless, we cannot disregard these inaccuracies, which Petitioner should have noticed and brought to our attention, because it undermines the reliability of the five-digit zip code data in these instances. We deny the petition as to these two Group C Communities, without prejudice to it being re-filed with calculations based on nine-digit zip code data.

9. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and reliable for purposes of concluding that Petitioner is subject to effective competition only as to the Group B Communities.

## **B. The Low Penetration Test**

10. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.<sup>19</sup> Petitioner alleges that it is subject to effective competition in the City of North Charleston under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.

11. The City objects to grant of the petition with respect to it. It first expresses concern that this proceeding may be Petitioner’s attempt to obtain a *de facto* resolution of an unresolved local cable dispute.<sup>20</sup> Next, it argues that the petition is premature, noting that the City never secured rate regulatory certification from the Commission.<sup>21</sup> Finally, it questions the “total franchise households” calculated by Petitioner and requests that Petitioner provide the Commission with greater factual background.<sup>22</sup> The

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<sup>16</sup>Petition at 7. .

<sup>17</sup>Petition at Exh. D.

<sup>18</sup>Petition at Exh. E.

<sup>19</sup>47 U.S.C. § 543(l)(1)(A).

<sup>20</sup> Objection at 2-3.

<sup>21</sup> *Id.* at 3-4.

<sup>22</sup> *Id.* at 4-5; Response at 1-2.

City asserts that Petitioner ignored a zip code that includes a portion of the City.<sup>23</sup> According to the City, Petitioner has provided it information indicating that it has more than 12,000 subscribers in that zip code.<sup>24</sup>

12. Petitioner responds that none of these arguments presents valid grounds for denial of its petition. Petitioner argues that the ongoing discussions concerning local franchise matters are unrelated to this proceeding.<sup>25</sup> Petitioner explains that a finding of effective competition here will not have any impact on these discussions.<sup>26</sup> Petitioner asserts that the City's failure to seek or obtain a rate regulatory certification has no bearing on whether the franchise area is subject to effective competition.<sup>27</sup> Finally, Petitioner explains that the subscriber count for the City of North Charleston is accurate and limited to the North Charleston franchise area and notes that, even if Petitioner had as many as 8,900 subscribers, it would still satisfy the low penetration test in the City of North Charleston.

13. We are not persuaded by the City's arguments. We agree with Petitioner that this proceeding is unrelated to any unresolved local cable dispute. Moreover, the fact that North Charleston has not sought or obtained rate regulatory certification does not bar Petitioner from seeking a finding of effective competition.<sup>28</sup> Lastly, we will not require Petitioner to submit additional information regarding its "total franchise households" or "total Time Warner basic subs." We find such action unnecessary. While the County disputes these numbers, it has not substantiated this argument with any evidence nor provided an alternate number of households or Time Warner basic subscribers for the North Charleston franchise area.

14. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment D, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the City of North Charleston. Therefore, the low penetration test is also satisfied as to the City of North Charleston.

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<sup>23</sup> Objection at 4-5.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> Reply at 2.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 2-3.

<sup>28</sup> *Subsidiaries of Cablevision Systems Corp.*, MO&O DA 08-891 at ¶ 1, n.3 (rel April 16, 2008), available at 2008 WL 1756787 ("Cablevision states that, in several Communities, its cable rates have never been regulated, but that it is petitioning to be free of rate regulation because "Verizon's provision of cable service [in those Communities] . . . removes any doubt regarding the absence of authority to regulate Cablevision's rates" in those Communities. [citations to record] We find no flaw in Cablevision's reasoning and filing petitions concerning Communities where there is no present regulation. Accordingly, we will rule on its Petitions for those Communities."); *Subsidiaries of Cablevision Systems Corp.*, MO&O DA 08-826 at ¶ 1, n.3 (rel April 8, 2008), available at 2008 WL 961122 (same).

### III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **IS GRANTED** as to the Communities listed in Attachments B and D and **IS DENIED** as to the Communities listed in Attachment C.

16. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth in Attachments B and D **IS REVOKED**.

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>29</sup>

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy  
Associate Chief, Media Bureau

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<sup>29</sup>47 C.F.R. § 0.283.

**ATTACHMENT A**  
**ALL COMMUNITIES**

<b>Communities</b>	<b>CUID(S)</b>
Dorchester County	SC0320
Lincolnton	SC0371
North Charleston	SC0394, SC0570
Ridgeville	SC0534
Summerville	SC0150

**ATTACHMENT B****“COMPETING PROVIDER” COMMUNITIES - GRANTED**

<b>Communities</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers+</b>
Dorchester County	SC0320	23.29	34,079	8083
Lincolnton	SC0371	15.21	347	53

\* CPR = Percent of competitive DBS penetration rate.

+ See Petition (in these Attachments, numbers of DBS subscribers are rounded off)

**ATTACHMENT C****“COMPETING PROVIDER” COMMUNITIES - DENIED**

<b>Communities</b>	<b>CUID(S)</b>	<b>Time-Warner Subscribership+</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated DBS Subscribers+</b>
Ridgeville	SC0534	152.34%	47.68%	214	102
Summerville	SC0150	98.52%	17.59%	10,391	1827

+ See Petition (in these Attachments, numbers of DBS subscribers are rounded off)

\* CPR = Percent of competitive DBS penetration rate.



**ATTACHMENT D****“LOW PENETRATION” COMMUNITY - GRANTED**

<b>Communities</b>	<b>CUID</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
North Charleston	SC0394 SC0570	29,783	801	2.69%